Supreme Court, U.S.
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No. 72-296

In The

Supreme Court of the United States

October Term, 1992

MICHAEL K. SCHMIER and MICHAEL K. SCHMIER, A PROFESSIONAL CORPORATION,

Petitioners,

vs.

TERRY S. KAPLAN, MICHAEL A. LOTMAN, COLLISSON & KAPLAN, LAWRENCE BROOKS, BROOKS INDUSTRIES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division 7

RESPONDENTS' BRIEF IN OPPOSITION

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19 pp

TABLE OF CONTENTS

Page

There Is No Basis Here For This Court To Grant Petitioners' A Hearing 1

Statement of Facts 4

Reasons for Denying the Writ 11

I. The petition should be denied because the underlying case was decided upon an adequate and independent non-federal ground..... 11

II. The petition should be denied because the state court decision correctly applied federal law..... 13

A. State Court References Do Not Violate Federal Constitutional Law. 13

B. There Is No Constitutional Bar To Use Of References At The Federal Or The State Level. 13

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Aetna Life Insurance Company v. Superior Court, 182 Cal. App. 3d 431, 277 Cal. Rptr. 460 (Cal. App. 1986) 8

Burns v. Ohio, 360 U.S. 252 (1959) 14

Contents

Page

Clark v. Deschamps, 109 Cal. App. 2d 765, 241 P.2d 681 (Cal. App. 1952) 10

Ellis v. Koshei Corporation, 145 Cal. 3d 642, 192 Cal. Rptr. 57 (Cal. App. 1983) 12

Escobedo v. Illinois, 378 U.S. 478 (1964) 11

Fry Roofing Co. v. Wood, 344 U.S. 157 (1952)..... 12

Gibson v. Berryhill, 411 U.S. 564 (1963) 14

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 15

Hayes v. Foodmaker, Inc., 634 F.2d 802 (9th Cir.. 1981) 12

Herb v. Pitcairn, 324 U.S. 117 (1945) 11, 12

LaBuy v. Howes Leather Company, Inc., 352 U.S. 249 (1957) 13, 14

Laguna Auto Body v. Farmers Insurance Exchange, 231 Cal. App. Ed. 481, 282 Cal. Rptr. 530 (Cal. App. 1991) 12

McDonald v. Smith, 472 U.S. 479 (1985) 14

Minneapolis Star v. Minnesota Comm. of Rev., 460 U.S. 575 (1983) 14

Contents

Page

Pellet v. Sonotone Corp., 26 Cal. 2d 705, 160 P.2d 783 (Cal. 1945) 10

Rinaldi v. Yeager, 384 U.S. 305 (1966) 14

Selby Constructors v. McCarthy, 91 Cal. App. 3d 517, 154 Cal. Rptr. 164 (Cal. App. 1979) 10

Smith v. Bennett, 365 U.S. 708 (1961) 15

Tumey v. Ohio, 273 U.S. 510 (1927) 15

Young v. Rosenthal, 212 Cal. App. 3d 96, 260 Cal. Rptr. 369, ____ U.S. ____, cert. denied, 110 S. Ct. 1811 (Cal. App. 1989) 12

Statute Cited:

California Code of Civil Procedure:

Section 47(2) 5

Section 639 2

Section 639(e) 5

Rule Cited:

Federal Rule of Civil Procedure, Rule 53 13

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RESPONDENTS' BRIEF IN OPPOSITION

THERE IS NO BASIS HERE FOR THIS COURT TO GRANT PETITIONERS' A HEARING

The petition inaccurately states the facts and the law relied upon in the underlying California case upon which petitioners seek

review. The misstatements include both omissions and outright misrepresentations to this Court. There is no federal constitutional question presented here for this Court's review. Moreover, petitioner's have waived any objection to the trial court's orders here and therefore are not entitled to review by this Court.

When the challenged discovery reference was first made by the trial court here, on May 11, 1990, petitioners did not object on any grounds.[1] Petitioners consented. Petitioners participated fully in the discovery reference process, including submitting briefs to and arguing to the referee — raising no objection at all to the judicial procedure in any of their submitted papers.

Likewise, when the advisory[2] reference of non-discovery motions was *suggested* by the trial court, on June 15, 1990, both petitioner Michael K. Schmier personally and petitioners' then counsel were present before the trial court and neither raised any objection upon any grounds to this separate reference. Again, both petitioner Schmier and petitioners' counsel participated in the advisory, non-discovery, reference process, including scheduling, briefing, arguing before the referee, and even to the extent of amending petitioners' pleading in response to the referee's recommended ruling on a motion for judgment on the pleadings before the trial court reviewed and adopted the referee's ruling. All this was done without any objection to the advisory non-discovery, reference.

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1. All discovery references under California Code of Civil Procedure Section 639 are advisory. The trial court reviews the referee's recommendations and any briefs regarding and/or objections to the referee's recommendations which the parties make, then the trial court schedules and hears argument on the recommendations and the trial court rules on the issues.

2. Petitioners omit to state that the broader reference here on motions other than discovery was also advisory, petitioners create the false impression in the petition that the referee was to make final rulings on substantive issues in the cases. He was not. The trial court was to and did fully review all recommendations of the referee, after briefing and argument by the parties.

Petitioners were informed by the referee's oral statement of his intended recommendations on July 31, 1990, that the referee would recommend that the trial court grant two motions to compel discovery against petitioners and award sanctions against petitioners of $1,334.00 and $2,330.50, respectively, on the two motions. Petitioners appeared again before the referee thereafter, on August 2, 1990, along with their counsel, and argued the respondents' summary judgment motion, without making any written or oral objections to the referee hearing the motion.

Only thereafter did petitioners object. On or about August 6, 1990, petitioners filed a motion to vacate the references and a motion challenging the referee's recommendations. The motion to vacate raised, for the first time, the constitutional issues raised in this petition. Therefore, petitioners' statement here that they raised the alleged constitutional issues "[a]t the early stages of the reference" is simply untrue.[3]

Three months had elapsed since the first reference and much had transpired under that reference and the second reference with petitioner's full participation. Plainly petitioners had consented to and participated in the reference procedures. Petitioners did not object until well after the initial recommended rulings were contrary to petitioners' position. This is the worst kind of "forum shopping," which should not be countenanced by this Court in any way. Petitioner's request for a hearing should be denied.

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3. Petitioners bald and unsubstantiated claims that, outside the record, petitioners allegedly raised constitutional issues herein by going to the California Judicial Council, the Los Angeles County Superior Court Supervising Judge, and the California Commision on Judicial Performance are unavailing and irrelevant. The burden upon a litigant and petitioner to this Court is to raise the constitutional issue in the subject proceeding, to give the trial court the opportunity to consider and rule upon that issue. This was not done here. Petitioners consented to the reference procedure and waived any constitutional objections they had to the references, fully participating until the initial recommendations of the referee were against them.

The case upon which review is requested here was decided on the grounds of petitioners' consent and waiver. The trial court in finding petitioners had consented to the reference procedure, specifically found a declaration submitted by petitioner Michael K. Schmier, claiming petitioners had not consented, was "clearly erroneous." The California Court of Appeal, whose decision was not reviewed by the California Supreme Court, upheld the trial court's ruling under the state law substantial evidence test, which provides an independent and adequate state ground for the underlying rulings. Therefore, there is no federal constitutional issue here for this Court to review.

STATEMENT OF FACTS

A fuller and more accurate statement of facts is necessary to reveal petitioners' omissions and misrepresentations of facts to this Court. On August 18, 1988 petitioner Schmier filed an answer to the complaint in the underlying malpractice action against him by respondent Brooks, denominated Case No. 691691 (hereinafter the "Malpractice Action") (1 Apx. Vol. I at 27-33).[4] No amended pleadings were filed. In November 1989, petitioner Schmier filed an action for fraud, breach of contract, and interference with prospective advantage against respondents, which action was denominated Case No. C742595 (hereinafter the "Schmier Action.") (1 Apx. Vol. I, 47-66). Both matters were eventually assigned to Judge Richard Hubbell in or about April, 1990.

On May 11, 1990 Judge Hubbell ordered the actions consolidated and, with several discovery motions pending in the consolidated actions, appointed retired California Appellate Court

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4. All references are to the record before the California Court of Appeal.

Justice Richard Amerian as discovery referee pursuant to California Code of Civil Procedure, Section 639(e) to hear discovery motions and to make recommendations to the trial court (1 Apx. Vol. II, 320-322.) Petitioners did not object on any grounds and, in their appeal in 2nd Civ. No. B055266, were held to have waived any objection to the discovery reference (Req. Jud. Not. Ex. "1" at 4).

On June 15, 1990, *with the consent of all counsel (including petitioners' counsel) and the consent of petitioner Schmier personally*, who were all then present before the trial court, the trial court issued a second order, appointing referee Amerian to hear and give advisory opinions on non-discovery law and motion matters (1 Apx. Vol. II, 322B; 1 Rsp. Apx. 72:16-74:2). Thereafter, counsel for all parties engaged in several telephone conference calls with Referee Amerian concerning the length of briefs, briefing schedules and hearing schedules regarding: (i) respondent Brooks' motion for judgment on the pleadings in the Malpractice Action; (ii) petitioners' motion for summary judgment in the Malpractice Action; and (iii) respondents' motion for summary judgment based upon California Civil Code, Section 47(2) in the Schmier Action. During those conversations, respondents' counsel never objected to the referee hearing law and motion matters (Apx. 1606-1607, 1657).

On July 31, 1991, pursuant to the briefing schedule confirmed by counsel with the referee, respondent Brooks' motion for judgment on the pleadings was heard by the referee. Petitioners' counsel and *petitioner Schmier personally* appeared before the referee. The merits of the motion were argued. Petitioners never raised an objection to referee Amerian hearing the motion either orally or in writing (Apx. 637-650). The referee then gave his oral recommendation to grant the motion, which he later memorialized in a written recommended decision dated August 16, 1990 (Apx.

1512-1518). Petitioners complied with this oral recommendation by filing an amendment to answer on August 20, 1990 (nearly one month *before* the trial court adopted said recommendation) (Apx. 1534-1537, Tr. 1; 7:23-8:5). Further, at that July 31, 1990 hearing, the referee advised petitioners that their brief on their motion for summary judgment then pending exceeded the 50-page limit previously set by the referee. Referee Amerian gave petitioners a time period within which to serve a new brief in compliance with the 50-page limitation (Apx. 1606-1607, 1646-1648). Petitioners did not object and complied with the referee's recommendation by filing an amended shortened brief (Apx. 1066-1128). The Kaplan firm gave notice of this recommended ruling to which neither petitioners nor his counsel objected (Apx. 1646-1648).

On August 2, 1991 petitioner Schmier and petitioners' counsel as well as respondents' counsel appeared to argue respondents' summary judgment motion in the Schmier Action. Petitioners had filed an opposition to said motion which did not include any objection to the referee hearing the motion (Apx. 792-828). The merits of the motion were argued before the referee.[5] No oral objection to the referee hearing the merits of the motion was made. After the hearing, the motion was continued on the referee's own motion to a later date to permit petitioner Schmier to file additional evidentiary opposition (Apx. 1606-1607, 1646-1648, 1657). Petitioners later filed an amended declaration as permitted by the referee (Apx. 1526-1533).

Therefore, between May 11, 1990 and August 2, 1990, petitioners and their counsel had participated in four hearings before the referee (on two discovery motions and on two law and

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5. For petitioner's benefit, the location of the hearing on both motions was moved from referee Amerian's office in Encino, California to the Los Angeles Superior Court courtroom of Judge Schifferman (Dept. 51) where petitioner's counsel, Mr. Esensten, was then engaged in trial (Apx. 859, 1516, 1620).

motion matters), participated in numerous conference calls with the referee, submitted several motions, oppositions and reply briefs to the referee, and had complied with several recommended rulings by the referee before the trial court reviewed and adopted those recommendations. Never once in any of the written or oral presentations mentioned above did petitioners object to the referee's status or inform the referee or the trial court that petitioners would not pay petitioners' portion of the fees. Instead, petitioner Schmier personally (an experienced attorney engaged constantly in labor law litigation) and petitioners' counsel continued to consent to the referee's appointment.

Despite this ongoing conduct, on August 6, 1990, petitioners *for the first time* gave notice to the trial court and respondents that petitioners had an objection to the referee hearing law and motion and discovery matters, by filing a motion to vacate the reference orders.[6] In the motion petitioners never claimed an inability to pay the referee's fees or the recommended sanctions. The motion was set to be heard September 14, 1990 (Apx. 877-905).

Petitioner Schmier's assertion in that motion and before this Court (App. Br. 17) that he "declined" telephone conferences with the referee is completely contradicted by the fact that his counsel participated in those conferences (Apx. 1606, 1619-1620, 1657). This is another miscitation of the record by petitioners here. Further, the petitioners' claim that petitioners advised the referee

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6. Notably, petitioners filed this motion only days after the referee served his written discovery recommendations and his oral recommendations on respondent Brooks' motion for judgment on the pleadings, all of which were adverse to petitioners. This was an apparent attempt to forum shop. Further, petitioners' claim that the Judicial Counsel advised petitioner Schmier to delay filing the motion to vacate the reference (App. Br. at 17, fn. 12) is not corroborated by his references to the appendix nor by any other part of the record. It is also irrelevant.

of the preparation of the motion to vacate is not supported by petitioners' reference to the record at the California Court of Appeal level (Apx. 1649) nor by any other evidence in the record. Petitioners' additional allegations (App. Br. 16-17) that the referee warned petitioner Schmier personally that the litigation would be "very expensive" and that the trial court specified that petitioners pay only "one fourth or one fifth" of the referee's fees rather than one half (as recommended by the referee) are only "supported" by petitioner Schmier's personal declaration filed with the motion to vacate, which the trial court later found to be "clearly erroneous." In that declaration, petitioner Schmier did not testify that he could not afford the referee's fees (Apx. 898-900). The motion to vacate was opposed timely (Apx. 1584-1653).

On September 14, 1990, petitioner's motion to vacate the reference order and his motion challenging the recommendations of the referee on three motions heard by referee Amerian, were heard and denied by the trial court. The trial court denied the motion to vacate the reference order, finding the reference proper and finding that all parties had consented to the non-discovery advisory reference, including petitioner Schmier personally. The trial court found that petitioner Schmier's declaration to the contrary was "clearly erroneous." (Tr. 1 at 4:74-7:22, 1 Apx. Vol. VIII at 1891:1-26; *see* order dated 10/15/90 attached to petition). The trial court also stated that petitioners' citation to the case of *Aetna Life Insurance Co. v. Superior Court*, 182 Cal. App. 3d 431, 277 Cal. Rptr. 460 (Cal. App. 1986) was "misleading to the Court."

The trial court then addressed petitioner's objections to the referee's recommendations on two discovery motions in the Schmier Action, to compel petitioner Schmier to respond to interrogatories and to compel petitioner Schmier to appear and produce documents at deposition. The trial court independently reviewed the court file, the pleadings on the motions and the

recommendations of the referee, which included a recommended $3,699.50 in discovery sanctions against petitioners. Upon completing this review the trial court adopted the referee's recommendations as the court's orders (Tr. 1 at 6:4-8:25; 1 Apx. Vol. VIII 1891:1-1893:7). The trial court also independently reviewed the pleadings and the referee's recommendation on respondent Brooks' motion for judgment on the pleadings (as to specific affirmative defenses of petitioner Schmier) in the Malpractice Action and upon such review adopted same which became the trial court's order (Tr. 1 at 7:23-8:5, 1 Apx. Vol. VIII 1893:8-17).

Petitioners were ordered by the trial court to comply with the reference order and to pay the outstanding referee's fees and discovery sanctions by September 28, 1990 (Tr. 1 at 9:5-10:20; 1 Apx. Vol. VIII 1893:2-1893:26). The trial court warned petitioners that if they failed to pay the discovery sanctions and/or the referee's fee by September 28, 1990, the trial court would sanction petitioners. The trial court told petitioners in open court that the sanctions would include the striking of petitioners' pleadings in the Schmier Action and the Malpractice Action. Petitioners made no mention before the trial court of any alleged inability to pay (Tr. 1 at 9:16-10:20 and 1 Apx. Vol. VIII 1893:27-1894:9). Petitioners were served with written notice of the court's rulings (1 Apx. Vol. VIII 1889-1896). Petitioners did not object to the notice.

Petitioners did not pay the referee's fees or discovery sanctions as ordered. At a status conference on October 3, 1990 (five days *after* the deadline given petitioners by the court), the trial court asked petitioner Schmier personally three times if petitioners intended to pay the fees and sanctions as ordered and three times petitioner Schmier *refused* to do so. The trial court then specifically warned "... I'm prepared to impose a sanction upon you as indicated. . . . You were ordered to pay certain sums and given time to pay it and you haven't done it. . . Do you intend to do so?" orally Petitioner Schmier responded directly: "It is not my intention to pay them." (Tr. 2 at 13:26-14:10). As the entire record reveals, *at no*

time, orally or in writing, did petitioners raise before the trial court the claim that they could not afford to pay the referee's fees and/or the discovery sanctions. (Petitioner Schmier asserted this alleged contention for the first time, on oral argument on appeal, before Division Seven of the California Court of Appeal in 2nd Civ. No. B055266.)

The trial court then struck petitioners' answer and dismissed the cross-complaint in Case No. 691691 and dismissed the complaint in Case No. 742595. On October 15, 1990, the trial court entered the order memorializing its oral orders of October 3, 1990, which is included with the petition herein (1 Rsp. Apx. at 79-86). No judgment was then entered in the malpractice action as the default prove-up hearing had not yet been noticed or heard.

The trial court's order striking petitioners' answer and dismissing the cross-complaint in Los Angeles Superior Court Case No. C691691 and dismissing the complaint in Case No. 742595 and the judgment in Case No. 742595 (as well as an order denying petitioner's motion to vacate reference and imposing discovery sanctions in excess of $750), were appealed by petitioner in 2nd Civ. No. B055266 (1 Apx. Vol. IX at 2083-2085). The judgment and the orders were affirmed by Division Seven of the California Court of Appeal on February 19, 1992, which held: "Having chosen to flout the [trial] court's order, Schmier cannot now complain about the dismissal. It is clear no lesser sanction would have been effective." (Req. Jud. Not. Exhibit "1").[7] Petitioner's petition for

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7. While the opinion in 2nd Civ. No. B055266 was not published, it is the law of the case with regard to these consolidated actions. *Clark v. Deschamps*, 109 Cal. App. 2d 765, 241 P.2d 681, 683 (Cal. App. 1952) [validity of trial judge's orders]; *Selby Constructors v. McCarthy*, 91 Cal. App. 3d 517, 521, 154 Cal. Rptr. 164, 166 (Cal. App. 1979) [applied the doctrine to a *prior unpublished opinion*]; *cf. Pellet v. Sonotone Corp.*, 26 Cal. 2d 705, 708, 160 P.2d 783 (Cal. 1945) [non-suited ruled upon in prior appeal]. The ruling is also *res judicata*, under California law since Schmier's petition for review to the California Supreme Court was denied on May 14, 1992 (Req. Jud. Not. Ex. "2").

review to the California Supreme Court was denied on May 14, 1992 (Req. Jud. Not. Ex. "2"). The remittitur was filed on June 1, 1992 making the decision final and noting that the cause was "Affirmed in Full," (Req. Jud. Not. Ex. "4").

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE UNDERLYING CASE WAS DECIDED UPON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND.

When the state court judgment rests on an independent, state law ground, this Court is without jurisdiction to review the case. *See, e.g., Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). In determining whether such a non-federal ground exists herein, it is only necessary to review the trial court order (October 15, 1990, attached to petition) and the California Court of Appeal opinion (February 19, 1992, attached to petition). The case turned, at both levels, upon factual issues of consent and waiver.

Since, as a matter of fact, it was determined that petitioners (1) consented to the references; and (2) participated in the reference process without objection and thereby waived any objections thereto, no federal jurisdiction should be asserted here. These factual findings form an independent and adequate state ground for the decision in the underlying case, which is in no way entangled with the alleged federal question which petitioners attempt to raise here.

There can be no question that federal constitutional issues and rights may be waived, even in criminal cases. *See, e.g., Escobedo v. Illinois*, 378 U.S. 478 (1964). Nor is there any question that federal law recognizes that objections to references can be waived by the

party's participation in the reference process and the party's failure to object. *See, e.g., Hayes v. Foodmaker, Inc.*, 634 F.2d 802, 803 (9th Cir. 1981). Therefore, notwithstanding any possible error in deciding federal constitutional questions, and respondents' maintain no such error occurred, the consent and waiver ground is sufficiently broad to uphold the state court judgment. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

These factual findings were upheld by the California Court of Appeal under the state law substantial evidence rule. The standard of review, properly applied, was abuse of discretion. *Young v. Rosenthal*, 212 Cal. App. 3d 96, 123, 260 Cal. Rptr. 369, __U.S. __, *cert. denied*, 110 S. Ct. 1811(Cal. App. 1989). [The trial court has broad discretion to impose discovery sanctions subject to reversal only for arbitrary, capricious, or whimsical action, with the appellant having a very heavy burden of proving abuse of that discretion.] Where a trial court has entered a sanction of dismissal "[t]he order of the trial court is presumed correct and all intendments and presumptions are indulged to support the order on matters to which the record is silent. It is Appellants' burden to affirmatively demonstrate error and, where the evidence is in conflict, [the appellate] court will not disturb the trial court's findings." *Laguna Auto Body v. Farmers Insurance Exchange*, 231 Cal. App. Ed. 481, 282 Cal. Rptr. 530 (Cal. App. 1991); *Ellis v. Koshei Corporation*, 145 Cal. 3d 642, 192 Cal. Rptr. 57, 58 fn. 2 (Cal. App. 1983).

This Court does not exercise its jurisdiction to review decisions of state courts decided upon such questions of fact. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952).

II.

THE PETITION SHOULD BE DENIED BECAUSE THE STATE COURT DECISION CORRECTLY APPLIED FEDERAL LAW.

What petitioners have failed to focus upon, clearly in an attempt to mislead this Court into improperly granting the requested writ, is that the dismissal in the case from which they appeal here was for failing to pay discovery sanctions and for failure and refusal to obey orders of the trial court. (*See* California Court of Appeal Opinion, February 19, 1992) . Considered in this proper light, the state court decisions were properly decided under both state and federal law.

A. State Court References Do Not Violate Federal Constitutional Law.

Petitioners' acrobatic efforts to find support for their position in the decisions of this Court have resulted only in miscitation of authority to this Court by petitioners. None of the cases relied upon by petitioners reject use of references by state courts on federal constitutional grounds, or on any grounds for that matter. Nor does the reasoning of any case cited by petitioners lead to such a result.

B. There Is No Constitutional Bar To Use Of References At The Federal Or The State Level.

The only case cited by petitioners dealing with references, *LaBuy v. Howes Leather Company, Inc.*, 352 U.S. 249 (1957), deals with federal references pursuant to Federal Rule of Civil Procedure, Rule 53. This Court held in *LaBuy* that "the detailed accounting required in order to determine the damages suffered by each plaintiff might be referred to a master. . ." *Id.*. at 259. Thus, even under the Federal Rules of Civil Procedure and the *LaBuy* opinion, use of masters or referees to try questions of fact is permissible.

In fact, the disfavor with which use of masters in federal courts has been viewed by this Court, does not rise to a constitutional level. Rather, this Court has reviewed federal references under this Court's supervisory power over the Federal Rules of Civil Procedure and generally over the procedures followed in the federal court system. *See, e.g., LaBuy v. Howes Leather Company, Inc., supra*, at 294 [question reviewed on writ of certiorari due to the "importance of the question is the administration of the Federal Rules of Civil Procedure, together with the uncertainty existing on the issue among the Courts of Appeals . . ."]. The *LaBuy* case does not interpose any constitutional roadblock to state court use of reference procedures.

The remaining cases relied upon by petitioners lend no support to their argument here. *McDonald v. Smith*, 472 U.S. 479 (1985) [holds only that the petition clause does not require absolute immunity for a defendant charged with making libelous and damaging statements in letter to the President of the United States]; *Minneapolis Star v. Minnesota Comm. of Rev.*, 460 U.S. 575 (1983) [holds that Minnesota's ink and paper tax singles out the press and therefore imposes a heavy burden on that state to justify the law, which the state failed to carry there]; *Gibson v. Berryhill*, 411 U.S. 564 (1963)[holds that a state's optometrist license review board which was made up of self-employed optometrists had a personal interest in decertifying optometrists employed by corporations and entities]; *Rinaldi v. Yeager*, 384 U.S. 305 (1966) [holds that New Jersey statute requiring prisoners to forfeit pay for costs of transcripts for prisoners' appeal was a denial of equal protection]; *Burns v. Ohio*, 360 U.S. 252 (1959) [holds that indigent defendants[8]

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8. Petitioner's arguments based upon their alleged indigent status is disingenuous. They never objected on this ground to the references, before oral argument in the Court of Appeal, or made any offer of proof of inability to pay. Petitioner Schmier is a wealthy labor attorney.

could not be required to pay a filing fe for a criminal appeal]; *Smith v. Bennett*, 365 U.S. 708 (1961) [holds that under a state law an indigent defendant may not be denied *habeas corpus* relief by statutory filing fee]; *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) [holds that a state poll tax penalized the poor and interfered with their right to vote]; and *Tumey v. Ohio*, 273 U.S. 510 (1927) [holds that trial before mayor, who got $12 for every conviction, was not upholdable]. Petitioners cite to no cases of this Court or the federal circuit courts of appeal supporting or requiring review here. There are none.

CONCLUSION

Based upon the above arguments and authorities, upon petitioners' miscitations and misrepresentations, upon the independent state ground for decision, and upon the consent and waiver by petitioners, the petition for a writ of certiorari should be denied. Petitioners here were merely "forum shopping" after losing the first motions referred to the referee. The state courts are empowered and entitled to prohibit such conduct, sanction the litigant involved, and enforce the state court's own orders. This is all that happened here and all for just cause, based upon findings supported by substantial evidence.

Respectfully submitted,

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Dated: September 14, 1992